

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|--------------------------|---|-----------------|
| UNITED STATES OF AMERICA | : | CRIMINAL ACTION |
| | : | |
| v. | : | |
| | : | |
| ANN ACKAA | : | NO. 01-571 |

MEMORANDUM AND ORDER

Fullam, Sr. J.

July , 2004

This is a strange case. On September 19, 1996, the defendant filed with the (then) Immigration and Naturalization Service an "Immigrant Petition for Alien Worker," INS Form I-140. One day less than five years later, the defendant was indicted because, according to the government, her 1996 application was "a false application ... which contained a false statement with respect to a material fact, specifically, the application included, as required supporting documents, both a fraudulent Posting Notice, which falsely purported to be signed by D.A. Director for the Cardiac Care Unit of Pennsylvania Hospital, and which falsely stated that no other qualified applications who were U.S. citizens were available to take the nursing position at the University of Pennsylvania Hospital, and a forged letter, which falsely purported to be signed by D.A. regarding [her] employment."

The same day the Indictment was returned, the government filed a motion to impound the Indictment, in order to

protect "the government's interest in protecting cooperating witnesses, and maintaining the secrecy of a grand jury investigation and an ongoing criminal investigation." A magistrate judge ordered "that the documents herein are sealed and impounded for the reasons set forth until notified by the United States Attorney," and directed the issuance of a bench warrant for defendant's arrest.

The Indictment remained under seal until on or about May 20, 2004, when the defendant was arrested and, for the first time, advised of the pending criminal charges (the Indictment was not formally un-sealed until May 24, 2004). Defendant thereupon filed a motion to dismiss the Indictment because prosecution was barred by the statute of limitations and/or by due process considerations. A hearing on that motion was scheduled for July 19, 2004. Meanwhile, on July 15, 2004, the government obtained a Superseding Indictment which added a second count, charging defendant with having falsely represented to the Social Security Administration, on or about June 29, 1987, that she was an American citizen, and that she did so for the purpose of obtaining a benefit for herself, in violation of 42 U.S.C. § 408(a)(7)(A) - according to the government, a continuing violation between 1987 and the date of the Superseding Indictment.

At the July 19, 2004, hearing, it was agreed that no issues with respect to Count II of the Superseding Indictment

were ready for disposition, and that the pending motion to dismiss the original Indictment applied to Count I of the Superseding Indictment.

The government properly argues that, since the original Indictment was returned within the five-year statutory period, it was timely filed. The issue is whether the additional 34-month delay in unsealing the Indictment and informing the defendant of the charges can be reconciled with due process requirements.

It is clear that delay in unsealing an Indictment, even after the statute of limitations has expired, is not necessarily fatal to the prosecution. Consideration must be given to (1) whether the Indictment was properly sealed in the first place, (2) the justification for the delay in un-sealing the Indictment and informing the defendant of the pending charges, and (3) whether, and to what extent, the defendant has suffered prejudice as a result of the delay.

An Indictment may be sealed for any legitimate prosecutorial purpose, or in the public interest. See United States v. DiSalvo, 34 F.3d 1204, 1218 (3rd Cir. 1994); United States v. Wright, 343 F.3d 849 (6th Cir. 2003). Ordinarily, Indictments are sealed for a very limited time, until the defendant is arrested. The government has shown no other reason for sealing the Indictment in this case. Although its original motion for impoundment recited various boilerplate reasons, there is no suggestion that, in fact, there was any ongoing

investigation which needed to be protected, nor any other valid prosecutorial reason. The delay was extreme: defendant was informed of the charges for the first time nearly eight years after the offense was allegedly committed.

The only explanation offered by the government is that there was a one-week delay in returning the Indictment because, allegedly, certain INS witnesses before the grand jury were otherwise occupied in view of the events of September 11. There is no explanation for the delay after the return of the Indictment.

As for prejudice, it is reasonable to suppose, as contended by the defendant, her ability to defend against the charges has been significantly impaired by the passage of time. Even at the time the Indictment was returned, some of the key witnesses before the grand jury expressed inability to remember some of the pertinent events which had occurred five years before, and it is quite doubtful that all of the pertinent records concerning her employment can be located and reassembled after so long a time, and in view of significant changes in the corporate structure of her employers.

I conclude that Count I of the Superseding Indictment should be dismissed. An Order follows.

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ORDER

AND NOW, this day of July 2004, IT IS ORDERED:

1. Count I of the Superseding Indictment is
DISMISSED.
2. Defendant's motion for a bill of particulars is
DISMISSED as moot.
3. This Order is without prejudice to the defendant's
right to challenge Count II of the Superseding
Indictment, and the government's right to resist
any such challenge.

John P. Fullam, Sr. J.